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ABSTRACT

To avoid fear of potential lawsuits, administrators today must include a school attorney in decision-making. An attorney is especially useful in performing such functions as reviewing board policies and administrative regulations; monitoring collective bargaining negotiations; advising concerning employee termination and nonrenewal; consulting regarding student civil rights; previewing board agendas; forecasting implications of pending legislation; representing school administration before administrative agencies; drawing up corporal punishment procedures; reviewing employee negligence procedures; advising concerning bidding on and offering service contracts; monitoring bonding and finance policies; counseling on reorganization procedures; and setting up transportation plans. School administrators must keep many important things in mind when retaining an attorney. Hiring should be done by the school board after careful study. Dismissing should only be for serious failings. Arrangements for payment should be clearly agreed on. The attorney's responsibility in litigation should be clearly spelled out. Most of an attorney's activity should be in preventing lawsuits. The relationship between the attorney and the school board should be open enough that the attorney will point out possible legal problems before they occur. Although retaining an attorney may at first look expensive, it may save the school large sums in lawsuits. (Author/JM)

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# SCHOOL ADMINISTRATOR AND ATTORNEY RELATIONSHIPS

## Suggestions and Considerations

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TABLE OF CONTENTS


INTRODUCTION . . . . . 1

ATTORNEY PARTICIPATION . . . . . 1

- Review Board Policies . . . . . 2
- Collective Bargaining . . . . . 2
- Employee Termination . . . . . 3
- Student Rights . . . . . 3
- Preview Board Agenda . . . . . 4
- Legislation . . . . . 4
- Administrative Agencies . . . . . 5
- Corporal Punishment . . . . . 5
- Employee Negligence . . . . . 5
- Contracts . . . . . 6
- Bonding and Finance . . . . . 6
- Reorganization . . . . . 6
- Transportation . . . . . 6

THE RELATIONSHIP

- Hiring an Attorney . . . . . 7
- Dismissing an Attorney . . . . . 8
- Financial Arrangement . . . . . 9
- Attendance at Board Meetings . . . . . 10
- Attorney as Board Member . . . . . 11
- Litigation . . . . . 12
- Procedure for Initiating Attorney Contact . . . . . 12
- Unsolicited Attorney Contact . . . . . 14

CONCLUSION . . . . . 15

FOOTNOTES . . . . . 17

## INTRODUCTION

School administrators should not needlessly fear the prospects of being sued. When making educational decisions, concern about possible lawsuits should be the furthest thing from their minds. What they should more reasonably fear is the prospect of losing.

Today in education, there are far too many decisions being made from a position of fear and uncertainty about potential lawsuits. This unfortunate condition is a partial result of the Tinker ("black armband") decision, which along with its progeny and kin, and collective bargaining, equal employment opportunity and desegregation issues has significantly increased school administrators' legal paranoia. They are fearful of lawsuits because they are aware that whatever the size of the district, its potential liability far exceeds its budget.

The administrator who continually gives more consideration to an unreasonable fear of the law instead of concentrating on educational opportunities for students and the community is severely handicapped in his administrative capacity. Besides keeping current in legal trends, administrators will have to bring the school attorney into the decision-making team. Previously, the school attorney was consulted on reorganization, bond issues, and infrequent litigation. He should now be considered an indispensable element in the decision-making process of all school districts. The school attorney's advice is not a guarantee of flawless legal decision making, but it does create a greater degree of certainty, which allows administrators to spend more time in educational administration and less time worrying about potential lawsuits.

## ATTORNEY PARTICIPATION

There are a number of situations which are generally considered to be the most valuable and appropriate for school attorney input.

Review of Board Policies and Administrative Regulations

In the past, local boards of education have been the primary formulators of local school policy. Today, other authorities, such as the courts, legislatures, and administrative agencies are playing an increasingly greater role in educational policy formulation. An attorney should regularly review both local policies and regulations to see that they are not in conflict with the law. By reviewing policies and regulations, an attorney can determine to what extent they are solidly based in the law. This precaution can help prevent unnecessary litigation and will help prevent the board from being placed in a position of later backing down and risking loss of credibility that could have only an adverse effect on board relationships with students, staff and taxpayers.

Removal of ambiguous language and legal imperfections should aid general operating procedures and give school administrators more confidence in carrying out their duties. In most areas of school law, there is considerable latitude for administrative experimentation and development of regulations suited to individual school district needs. Attorneys should not write policies and opinions, they should only review them.

Review of board policy and regulation should be completed on an annual basis. Some areas should be subject to review more often. A regular review of rapidly developing areas of law, such as student and teacher rights, will aid administrators in carrying out their duties, especially when a potential legal crisis arises and the attorney is not immediately available.

Collective Bargaining

Requests for negotiation by employees should be reviewed with an attorney prior to taking action on the request. The school board and administrators may discover too late that they are negotiating items which are not required to be negotiated. There are many instances where employees have requested bargaining on matters determined by the courts not to be proper

items of negotiation. Occasionally, school officials negotiate matters when they would have preferred not to, only to later find that they were not legally required to do so. Once a contract is negotiated, an attorney may be called upon to interpret its terms for school management personnel. The school attorney may also be called upon for advice and information regarding the rights of employers and employees and unfair labor practices.

Many school districts have found it valuable to include the school attorney on the negotiation team and to install him as leader. The combination of legal knowledge and adversary skills experience are invaluable in negotiation sessions.

Employee Termination and Nonrenewal

In no other area of school law can a good relationship between attorney and administration do more to eliminate or lessen serious legal complications than in termination and nonrenewal of employees. A school attorney can be of continuing assistance by advising the superintendent on problems as they arise. When desired, the superintendent can arrange staff administrator's meetings with the attorney to discuss these problems.

Insufficient or improper documentation always makes termination and nonrenewal more difficult and often unsuccessful. Review by an attorney of evaluation methods and the type of records which need to be kept for proper dismissal and nonrenewal will create a greater chance of success. Advance consultation with an attorney to establish the necessary criteria will alleviate many problems regarding dismissal.

The school attorney should be present for all determinations of termination and nonrenewal. His availability to give advice to the board should lessen or eliminate the more serious legal complications.

Student Rights

The rapidly changing area of student rights is often misunderstood by administrators. For instance, most would be surprised by the wide range

of circumstances which the courts have upheld as reasonable grounds for legal searches of students and lockers. Many will find most state laws dealing with suspension and expulsion of students deficient in their lack of procedural due process. Also, many school administrators, swamped with information on student rights, might be pleasantly surprised at the information a school attorney could furnish to staff and students on student responsibilities. A recent United States Supreme Court case holding that school board members may be held liable for the abridgement of obvious student civil rights makes this a very important area for school attorney-administration consultation.

Preview of Board Agenda

A recent Nebraska study showed that about 80 percent of the superintendents involved in the study did not preview board agendas with legal counsel.[1] However, most superintendents did consult with attorneys when they recognized potential problems in matters coming before the board. This is not sufficient. Whether or not the attorney regularly attends meetings, he should always be consulted sufficiently in advance to enable him to point out potential problems, and if necessary, prepare an opinion. An attorney's review not only aids in identifying potential legal problems, but enables the superintendent to clarify and update problems that he must present to the board.

Legislation

The legal effect of pending legislation upon school management may not always be clear. School administrators should not hesitate to contact the school attorney in regard to potential implications of proposed legislation. Cooperation with the school attorney will place the district in an informed position with regard to legislation. Some districts may find it desirable to have their attorney review legislation which they have drafted before it is presented to the legislature. In most instances, the local

school administrator will exert more influence through personal contact with a legislator than will paid lobbyists. A single phone call by a superintendent to his representative in the state legislature has been known to change the entire complexion of an important education bill to be more favorable to the school administration's point of view.

Administrative Agencies

More school issues are being brought before administrative agencies than ever before, and the trend is likely to continue. While many school administrators currently feel that they have the knowledge and experience to appear before administrative agencies, administrative agency law and concepts are becoming increasingly complex. If the proceeding is in any way one of advocacy, it is best to be represented by a professional advocate, the school attorney.

Corporal Punishment

School policies and procedures regarding physical punishment of students should be drawn with the cooperation of an attorney, adopted and disseminated, and periodically reviewed with the staff. Courts are currently reviewing corporal punishment procedures with mixed results based largely upon the particular fact situations before them. An attorney's review will better insure that a school district's procedure does not create a "bad fact" situation.

Employee Negligence

Early consultation with an attorney and regular review of the district's procedure in handling instances of potential negligence liability may save the school district a great deal of time, money, and embarrassment. Gathering and organizing facts as early as possible is very important because early and proper investigation often means the difference between winning and losing a lawsuit. The wording of communications, both public and with potential parties, such as parents of injured students, should be reviewed by an

attorney in all instances of potential litigation. Liability insurance coverage should be periodically reviewed with an attorney.

Contracts

All contracts, especially construction contracts, should be discussed with counsel before official action is taken. Much of the law dealing with contracts is statutory and is strictly construed. A general review of all contracts will enable the attorney to revise those which may be detrimental to the school district. An attorney can advise on the proper use of district funds. All contracts should be discussed well in advance of letting and an attorney should supervise the letting of contracts on a bid basis if that method is to be used. A contract improperly entered into is void.

Employment and service contracts should be reviewed with special care. The use of form contracts in special employment circumstances is a frequent cause of avoidable litigation which very often has unfortunate results for school districts.

Bonding and Finance

Even though the technical work in bonding and school finance is normally left to specialists such as bonding attorneys, the school attorney should review their advice. Due to the attorney's general legal and business experience, his advise can often result in financial savings for the school district.

Reorganization

Reorganization requires the close cooperation of administration and attorney. The drafting of necessary documents must be done very carefully. There are numerous cases involving difficult legal questions that competent counsel could have prevented and thus saved the district complicated and expensive litigation.

Transportation

Provisions for student transportation are basically statutory and

once procedures are properly established, few problems arise. A good working relationship will enable the attorney and the administration to anticipate the few complicated issues so the administration will better know when to contact the attorney.

### Unique Situations

Each district has unique problems which are best handled through the cooperative efforts of the attorney and the school administration.

## THE RELATIONSHIP

Few school district administrations have to be sold on the proposition of obtaining legal input into decision making. However, not many have had continuing relationships with attorneys and are uncertain as to the steps that should be taken to involve attorneys in a commitment to a school district. There are a number of important things to keep in mind.

### Hiring an Attorney

Hiring an attorney should be the responsibility of the school board and should be undertaken only after considerable study. The superintendent should be allowed to make recommendations and support his reasoning.

The form of legal advice available to districts varies, but the general practice is to hire a law firm to represent the school and then work regularly with one or two members of the firm. This approach is particularly valuable because school law issues involve many different legal areas such as contracts, property, wages and hours, and constitutional rights. Most law firms have at least an informal specialization of practice that will allow the school attorney to confer with his associates in their areas of special knowledge and experience. This law firm approach also allows the school to contact other firm members when the school's regular attorney is not available.

Those districts which hire inhouse legal counsel as district personnel

will have easy access to legal input for their decision making, but will most likely continue to use outside legal counsel for litigation and specialized legal problems. Today, many attorneys are considering entering school administration and many administrators are considering entering the legal profession. The result should be beneficial for both education and law.

A few districts have hired an attorney on a part-time basis as a regular school employee. This does not appear satisfactory, as both the school and the attorney's other clients are jealous of the attorney's time, and conflicts and disputes are likely to arise.

When searching for an attorney or a law firm to represent the district, it is always best to hire those persons with either experience in school law or the willingness to devote extra time to become familiar with school law issues. Most practicing attorneys are not sufficiently prepared or experienced in school law to give the quality legal input needed by school administrators.

Prospective school district attorneys should be asked to give the board a statement of professional background, especially in the practice of school law concepts. Have them submit a list of cases, actions, and issues in which they have been involved and a list of their memberships in professional organizations. A statement of familiarity with school law issues, organizations and source materials should also be requested. Educational organizations, such as state school board associations, can frequently furnish lists of attorneys active in school law practice.

Dismissing an Attorney

While a school client has the perogative of dismissing its attorney at any time, it is an unlikely occurance except when serious failings have occured on the attorney's part or when the school administration has not been diligent in its supervision of attorney utilization. Ordinarily, the attorney prefers

that the dissatisfied client confer with him on what are considered to be his shortcomings. He then has the opportunity to explain the reasons for his actions or alter his approach to conform with his client's wishes. A client may dismiss an attorney at any time and have his file turned over to a new attorney after any money owed has been paid.

Financial Arrangement

One of the most frequent causes of conflict in an attorney-school client relationship is payment for services. As soon as possible after selecting an attorney, arrangements for compensation, billing, and payment should be agreed upon by the parties. For practical purposes, this arrangement should be reduced to writing.

Attorneys generally charge on an hourly basis, but some circumstances may arise in litigation when it would be best to have a fee arrangement contingent on the outcome of the lawsuit. Generally, the routine work done by the attorney should be on an hourly fee basis, and a decision as to hourly or contingent fee can be mutually agreed upon as litigation arises.

Billing and payment should be on a regular basis. Some attorneys don't bill school districts regularly, and this leaves the district uncertain as to the type and nature of the legal fee it is incurring. The school administration must be able to evaluate the return they are receiving for their money. If a bill arrives every six months, or whenever the amount owed reaches a fixed amount, the administration will have difficulty in identifying the costs of various services performed and relating them to the results. Monthly billing allows the district better control over money and better supervision of legal aid from the attorney. It also allows for a smaller amount of debt which the school board may more easily cut off as it desires.

School districts, in some states, pay their attorney a retainer, but there are a number of reasons why retainers are generally not desirable. Each school should

evaluate its own circumstances to make the determination on an individual basis. In some states, such as Iowa, the use of retainers in hiring attorneys is legally questionable.

There appears to be no common definition on use of retainer. To some attorneys it is a minimum fee, for others it is an average, and to others a maximum. Some attorneys consider it as a fee in addition to the normally agreed upon fee. Generally, retainers reflect a belief that services will be performed on a regular basis. Both sides are turned into gamblers. If there is not much work performed during the period, the school board will not like paying a retainer. If there is considerable work, the attorney may not like the retainer. As more specialization occurs in the practice of school law, the geographical distances between schools and their attorneys are likely to become greater. Retainers are less desirable when the attorney is located in a distant town, but are more desirable when the attorney is local and experience has shown what the billing will generally be.

It is important that both parties feel free to discuss charges for legal services and the billing method. School administrators should never be afraid to request an advance estimate. Fees and billing arrangements should not be allowed to become areas of disagreement between attorney and client.

Attendance at Board Meetings

The advisability of the school attorney attending board meetings is primarily a matter of weighing expense against benefits. Considering the length and frequency of meetings, it may not be economically feasible to pay an attorney to sit at a board meeting where he is not frequently called upon for legal advice or counsel. However, some larger school districts may be involved in more pressing legal issues and may find a greater need for the school attorney's regular attendance.

District business before some boards may be handled more efficiently with an attorney present on a regular basis. When the school attorney is present, the board will be better able to receive timely legal advice and information and not have to hold business for a later meeting.

If an attorney is asked to regularly attend meetings, additional consideration should be given. It may be unfair to the attorney to pose legal questions at a public board meeting without advance notice, since such action does not allow for legal research and reflection. Whenever possible, off-the-cuff legal opinions should be avoided. Some consideration must also be given to an attorney's time and availability This point is not crucial when working with a law firm of several persons. However, when individuals are employed, a good relationship must be built upon a respect for the attorney's time.

Occasionally, after a long relationship, an attorney forgets his place and enters discussions on nonlegal and discretionary board matters. This problem rarely arises, but has serious consequences when it does. He should be timely and tactfully reminded of his proper place on the decision-making team. If the attorney persists, the relationship should be dissolved.

Attorney as Board Member

Many school boards have local attorneys as members. Those boards should be cautioned against using the board member as formal or informal counsel. He was elected to serve as board member, not as the school attorney. His responsibility is to pass judgement on policy questions and not to determine the legality of a course of action. His effectiveness as a board member-policy maker will be greatly diminished if he is to also fill the role of legal counsel.[2] His arguments in board debate may be given undue weight if his personal opinions are accepted as legal opinions.

Litigation

Whenever a school district finds it necessary to prosecute or defend in a lawsuit, or finds itself involved in an administrative action, a procedure should be established which clearly outlines the relationship of the attorney and the school district. The attorney should prepare an initial analysis describing the facts and laws which bear upon the issues. Because school administrators are unaccustomed to the long waits often involved in final legal determinations, the attorney should outline the goals of the suit and the time sequence of the various stages of litigation. In order to better evaluate the attorney and the progress of the suit, the attorney should be required to report periodically.

Procedure for Initiating Attorney Contact

Although attorneys play a vital role in litigation, the primary thrust of a school attorney's activity should be of a preventative nature. He should provide advice which will protect the school district from challenge of its management decisions. In law, as in other things, prevention is less expensive than the cure.

School boards should authorize the superintendent and other specified staff members to contact the school's attorney when they wish to do so. It is desirable to allow administration the freedom to contact the attorney either by telephone or by letter whenever it feels that there are problems that should have the attorney's attention. When and how the attorney should be consulted should be in writing and distributed to all staff members. The degree of flexibility needed depends upon the size of the district, the administration-board relationship, and other matters of individual circumstance. The procedure should not be allowed to become so inflexible that both common and uncommon occurances cannot all be handled in a reasonable manner.

The primary authority to contact the attorney should rest with the super-

intendent or someone directly under his supervision. The larger the district, the more people there are with responsibilities that call for legal advice. Other administrators and staff members should be allowed to contact the attorney directly under certain circumstances, especially if school professionals other than the superintendent handle particular problems with legal ramifications. Emergency situations should be covered in advance, so that a principal or other staff members would know who to contact.

It is best to have initial contacts with the attorney routed through the superintendent or someone designated by him. This not only provides a good sounding board, but will help eliminate duplication of questions presented to the attorney. It is valuable to have a clearinghouse for attorney contacts. Material regarding previous attorney contacts should be collected and compiled for reference, thus preventing recontacting the attorney on the same question. Money as well as time will be saved by such a clearinghouse.

When the attorney's fee is to be based in part on the number of contacts made, they may have to be controlled to keep cost down. However, unfortunate results may occur when initial cost considerations are allowed to weigh too heavily upon deciding whether or not to contact the attorney. More freedom should be allowed by not directly relating the attorney's fee to the number of contacts.

It may be best to allow direct lines of communication to the attorney for certain staff members. Some school attorneys and administrators have found it desirable to have a direct line of communication with principals and guidance counselors. Not only can a number of legal pitfalls be avoided by immediate contact, but maximum service is provided to students facing various difficulties. In many circumstances, information received by guidance counselors is of a confidential nature, and in order to preserve this confidential relationship, it may be best not to have a preliminary dis-

cussion of the legal implications of those matters with other school personnel.

Board members should generally raise legal questions for the attorney through the superintendent. At times, however, communication with the administration becomes unsatisfactory or matters at issue may be contradictory to the interests of the administration. At those times, board members should be expected to personally contact the attorney. After all, it is the board which hires, pays, and fires the attorney--not the administration.

There are numerous legal deadlines to be met when served with legal papers. Districts should have written procedures requiring all employees and board members to immediately turn over to the central school office anything that looks like a legal document. It should be standard policy to deliver the document to the attorney the same day.

Unsolicited Attorney Contacts

School administrators are becoming aware of their legal rights, duties, and responsibilities at an ever increasing rate. This is accomplished primarily through professional associations and periodicals. However, no amount of diligence can keep the administrator fully aware of the legal pitfalls which arise from the many decisions that he makes daily. Attorneys have a community interest and try to keep current in local events. They have numerous non-educational contacts in the community and have many sources of information through which they often become aware of potential legal problems for the school.

Most attorneys are hesitant about coming forward with unsolicited information about school affairs. Some do not want to be considered meddlers and others do not want to be accused of creating work for themselves or "soliciting" business.

It is good policy to create and maintain good communications through a close working relationship with the attorney so that any information that would be of assistance to the school district's decision makers will be available in making proper legal evaluations of problems that may arise. Edwin Perry, a prominent Lincoln, Nebraska, attorney who represents numerous school districts on a regular basis said it this way:

> We [his law partners] feel that it is very desirable for the school district and the attorney to have a close enough working relationship so that if the attorney becomes aware of matters that may be affecting the school administration, we feel free to give them at least a general awareness of an area of possible problems without the school district feeling that the attorney is trying to solicit business or do anything other than keeping them properly advised.[4]

This type of relationship will enable the school administration to cope with some legal problems in advance or at least lessen the severity of their impact. It should reduce the element of surprise and help eliminate administrative snap judgements. This type of trusting, communicative relationship can only add to the quality of education in the community and lessen the overall legal expense of the district. As it is a good policy for corporate legal counsel to know his client's products, so too should the school attorney be encouraged to become familiar with the administrative operation of the schools so that he may take a more active part in the decision-making process.

Legal counsel should be informed of legal information being furnished to the school through various sources. This helps eliminate some duplication of effort and avoids incurring unnecessary legal fees.

CONCLUSION

One of the major difficulties in establishing a good working relationship appears to be an apprehension on the part of administrators that they will be spending more money than is reasonable for legal services. Edwin Perry views such fears as unfounded:

> One of the major difficulties appears to be something of a fear on the part of school boards that they will be spending more money than is reasonable for legal services. It would be our [his law partners] reaction that quite often they are "penny wise and dollar foolish." If they would talk to a legal representative and have confidence in a legal representative treating them in a professional and fair manner with regard to his services and charges for the services it would in many situations avoid both problems and expense, both legal and otherwise, that they incurred because they have not been willing to spend comparatively small sums for legal counsel to begin with.[5]

Perry is joined in this view by prominent Iowa school law attorney Edgar Bittle:

> The attorney's best service to the school district may be keeping the school district out of legal difficulties. If the district does not call the attorney until the problem exists, it may be too late, or the problem may have progressed to a point that the options for solution are exceedingly slim and more costly to the district.[6]

School administrators must recognize and utilize the talents of competent attorneys available in the community. Through a good working relationship with an attorney they will be better able to stand fearlessly by the educational decisions they make. The entire educational community will benefit and usually at less cost.

## FOOTNOTES

[1]Gayle H. Hurlbert, A Study to Determine How Decisions Relating To Legal Matters Are Made Within The School Context In Nebraska Public Schools, dissertation, Dept. Ed. Admin., University of Nebraska at Lincoln, July, 1973.

[2]Edgar H. Bittle, "The Role of the School Board Attorney," Iowa School Board Dialogue, May-June, 1975, p. 7.

[3]Raymond G. Kuntz, "How To Help Your Attorney Win Your Case When Your School District Is Sued," The American School Board Journal, Vol. 160, October, 1973, pp. 35-37.

[4]Interview with Edwin Perry on May 22, 1974, in his office at Perry, Perry, Witthoff and Guthery, 1806 First National Bank Building, Lincoln, Nebraska.

[5]Ibid.

[6]Bittle, op. cit.